STATE OF MICHIGAN

COURT OF APPEALS

WALTER TOEBE CONSTRUCTION CO., Plaintiff-Appellant,	UNPUBLISHED March 9, 2004
v	No. 244356 Court of Claims
DEPARTMENT OF TRANSPORTATION, Defendant-Appellee.	LC No. 01-017956-MT

Before: Owens, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

I. Material Facts

The material facts of this case surrounding the submission of plaintiff's claim are undisputed, and were set forth by the trial court[1] as follows:

> Plaintiff, Walter Toebe Construction Company (Toebe) and the State of Michigan Department of Transportation (MDOT) entered into a contract wherein Toebe would serve as the contractor to build various buildings at the Blue Water Bridge. Toebe contracted with numerous subcontractors, including Artco Contracting, Inc. (Artco). Under its contract with MDOT, Toebe remained responsible for all work as if they had not subcontracted. MDOT was also given a right to amend the contract. It is undisputed that MDOT exercised that right and amended the contract, including the plans and specifications in order to satisfactorily complete the project. The contract provided that Toebe would be paid for the amended work either by negotiated agreement or by force account. Additionally, in certain situations, Toebe had the right to, and did in fact, reserve an administrative claim review by MDOT's Central Office Review (COR). With regard to the COR review, the contract also provided that "[t]he Department's

[1] The trial court's recitation of the material facts are not challenged on appeal.

decision would be final and binding and not subject to further review or consideration."

The record reflects that Toebe, under the amended contract, was compensated an additional $9,734,909.21. The record further reflects that to the extent that Toebe refused to reach an agreement concerning uncompensated amended work and the MDOT Engineer permitted Toebe to reserve the right to make an administrative claim, the COR denied all such claims. Defendant MDOT argues that this denial was based both on the merits and/or calculation of the claims, as well as Toebe's failure to timely file the claim.

The Contract, at § 1.05.12(c), provides that Toebe must file its claim within the *first* of either 120 days after work is completed or the claim event terminates, or 60 days after the contract is completed. The work on the contract was completed December 5, 1996. The record reflects that over five months later, on May 16, 1997, Toebe submitted a table of contents of claims to MDOT. The Defendant argues that, contrary to the contract language, Toebe did not file a factually supported claim stating the specifics for each and every claim for extra compensation. On September 24, 1997, nine months after the contract was completed, an FOIA request was made on behalf of the Plaintiff.

On August 31, 1998, approximately one year after the FOIA request, Toebe filed a claim document. MDOT notified Toebe that the claim document did not include the required documentation. On October 1, 1998, the law firm of Federlein & Keranen, P.C., promised that it would deliver the supporting document to MDOT on October 6, 1998. This did not happen. On October 22, 1998, MDOT notified Toebe this its [sic] claim was denied for failure to timely file it. On December 28, 1998, Toebe and Artco requested a COR hearing. As previously stated, COR denied all of Toebe's claims. Subsequently, Toebe filed this lawsuit.

II. Analysis

Before we commence with our analysis of the dispositive issues in this case, we are compelled to point out that plaintiff has provided virtually no citation to the record in its brief on appeal. Indeed, plaintiff has set forth a twenty page statement of facts, yet has only three citations to the record within those twenty pages. What plaintiff has instead done is set forth numerous conclusions and statements of purported fact, but has not provided citation to any supporting evidence. Moreover, on the issue determined dispositive by the trial court, plaintiff merely directs this Court to review its letters of intent to file a claim, without citation to the lower court record or any sufficient identification of those documents. "A party may not leave it to this Court to search for a factual basis to sustain or reject its position." *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). And, when a party fails to provide record support for its position on appeal, the issue is deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). This case has, therefore, not been properly presented to this Court for appellate review. Nevertheless, from our independent review of what does exist in the record, we find that the trial court properly granted defendant's motion for summary disposition.

A. Court Rule

Plaintiff first argues that the trial court erred by permitting defendant to bring its motion for summary disposition without providing plaintiff the requisite time for response pursuant to MCR 2.116(G)(1)(a)(i). Specifically, plaintiff contends that defendant should not have been permitted to bring its cross-motion for summary disposition in response to plaintiff's motion for summary disposition under MCR 2.116(I)(2) because defendant presented the court with a different set of arguments and allegations than those contained in plaintiff's motion. We disagree.

This issue involves interpretation of a court rule, which is a question of law that is reviewed de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001).

Plaintiff contends that defendant failed to meet the twenty-one day notice period required by MCR 2.116(G)(1)(a)(i), which provides, "Unless a different period is set by the court, . . . a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for hearing . . . ." It is uncontested that defendant's motion was not filed twenty-one days prior to the hearing date, which had been set for June 5, 2002. However, MCR 2.116(I)(2) provides, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." Here, defendant's cross-motion for summary disposition may be more properly described as its response to plaintiff's motion for summary disposition. Despite plaintiff's contentions otherwise, defendant's arguments were in direct relation to plaintiff's motion for partial summary disposition. Defendant's request for summary disposition, made in response to plaintiff's motion, was therefore properly before the lower court pursuant to MCR 2.116(I)(2), and could properly be decided.

B. Summary Disposition

Plaintiff further contends that the trial court erred in granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). This Court applies the following standard in reviewing the propriety of a trial court's decision made pursuant to MCR 2.116(C)(10):

> A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Singerman v Muni Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). Summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue about any material fact. When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider all pleadings, affidavits, depositions, and other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The nonmoving party has the burden of rebutting the motion by showing, through evidentiary materials, that a genuine issue of disputed fact does exist. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). [*Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 528-529; 660 NW2d 384 (2003).]

Additionally, this issue involves contract interpretation, which this Court also reviews de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). It is a well-established rule of contract interpretation that the intent of the parties is to be ascertained and enforced according to the plain language of the contract. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603-604; 576 NW2d 392 (1997). Further, definite and unambiguous contract language must be enforced as written and courts may not write a different contract under the guise of interpretation or consider extrinsic evidence to determine the parties' intent. See *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

Plaintiff contends that § 1.05.12 is not determinative to this case because it is limited in its application to circumstances where the contractor intends to seek extra compensation for any reason not specifically covered elsewhere in the contract. Plaintiff further argues that if § 1.05.12 applies, then it was in compliance with that section, and the trial court improperly granted defendant's motion for summary disposition. We disagree.

The contractual provision at issue in this case provides as follows:

> A Contractor shall file each and every claim for extra compensation or an extension of time, except as set forth in Subsection 1.05.01-b, with the Engineer in a timely manner but no later than 120 days after the work involved is completed, or the delay, loss of efficiency, loss of productivity or similar event is terminated, or 60 days after the contract is completed, whichever occurs first, unless extended in writing by the Engineer prior to the expiration of such time periods.
>
> Each claim, when filed, shall include all facts which gave rise to the claim, with a copy of the specific provisions of the contract which support the claim and the dollar amount of the claim with an explanation of how the amount was calculated. The Engineer will review the claim pursuant to the Department's written claim procedure and in accordance with the method set forth in Subsection 1.05.12-d.

The language cited by plaintiff in support of its argument that § 1.05.12 does not apply is taken from the notice provision of the contract (§ 1.05.12(a)), and requires that a contractor intending to seek extra compensation for any reason "not specifically covered elsewhere in the contract" must "notify the Engineer in writing of the Contractor's intention to make claim for such extra compensation . . . ."[2] Contrarily, § 1.05.12(c) relates to the actual filing of claims, and

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[2] Section 1.05.12(a) provides, in relevant part:

> Notice of Claim-If the Contractor intends to seek extra compensation for any reason not specifically covered elsewhere in the contract, the Contractor shall notify the Engineer in writing of the Contractor's intention to make claim for such extra compensation before beginning work on which the Contractor intends to base a claim or the Contractor shall notify the Engineer within 24 hours after the

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requires that "each and every claim for extra compensation," as plaintiff claims entitlement to in this case, be filed with the Engineer in a timely manner. Thus, plaintiff's reliance on § 1.05.12(a) is misplaced, as § 1.05.12(c) applies to all claims for extra compensation, and § 1.05.12(a) relates only to the notice that must be given for certain claims.[3]

Additionally, plaintiff has failed to demonstrate that it complied with the terms of the contractual provisions relating to the filing of a claim.[4] Plaintiff indicates that on four occasions, it wrote letters to defendant, placing defendant on notice of delays or its intention to submit a claim for additional costs or an extension of time. However, as plaintiff notes, notice was not an issue in this case; rather, the issue was whether plaintiff complied with the requirements of § 1.05.12(c).

Section 1.05.12(c) clearly and unambiguously requires that "each and every claim for extra compensation" be filed with the engineer in a timely manner, "but no later than 120 days after the work involved is completed, or the delay, loss of efficiency, loss of productivity or similar event is terminated, or 60 days after the contract is completed, whichever comes first, unless extended in writing by the Engineer prior to the expiration of such time periods." It is undisputed that the work on the project was completed on December 5, 1996. Viewing this evidence in a light most favorable to plaintiff, this date would have been the most permissive in providing plaintiff with 120 days to file its claim. However, the earliest date alleged that a claim was filed by plaintiff was May 16, 1997, which merely consisted of a table of contents and Artco's claim box. This date came well after the 120-day allotment for filing a claim; thus, plaintiff's "claim" was untimely in accordance with the contract.

Further, it is not apparent that plaintiff's alleged May 16, 1997, claim met the substantive requirements of § 1.05.12(c), which demands not only that a contractor comply with the time constraints, but also that the each claim filed "include all facts which gave rise to the claim, with a copy of the specific provisions of the contract which support the claim and the dollar amount of the claim with an explanation of how the amount was calculated." There is no evidence that plaintiff complied with any of these requirements as the alleged claim provided defendant with nothing other than a table of contents and a "claim box" from Artco. Accordingly, the trial court

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> commencement of the delay, suspension of work, loss of efficiency, loss of productivity or other similar event on which the claim will be based.

[3] Although § 1.05.12(c) references § 1.05.01(b), that section has no application to the instant case, which redirects claims for disagreement in compensation to § 1.05.12, and plaintiff makes no assertion otherwise.

[4] Plaintiff argues for the first time in its reply brief that defendant waived the issue relating to compliance with the claim requirements set forth in § 1.05.12(c). However, plaintiff's waiver issue was not set forth in its statement of questions presented, nor did plaintiff set forth any argument on that issue in its brief on appeal. Accordingly, this issue has been waived. "Reply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).

properly determined that plaintiff failed to comply with the requirements of § 1.05.12(c) in granting summary disposition in favor of defendant.

Because there is no issue upon which reasonable minds might differ is left open, no genuine issue of material fact exists. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Additionally, in light of the nature of our resolution of this case, we need not address plaintiff's remaining appellate issues.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Christopher M. Murray